

Home Builders Beware: Are you providing a warranty you did not intend?

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Since 1979, Illinois courts have held that all new construction homes come with an implied warranty of habitability. This means that the home must be built sufficient for its intended purpose as a residence and the builder is responsible for even unknown defects that negatively affect the usefulness of the structure as a residence. The implied warranty is in effect for a “reasonable” period of time after construction. The good news for builders is that the courts have, also, held that a buyer and the builder may include a knowing waiver of this implied warranty in their contract. There are, however, strict requirements imposed to establish a knowing waiver – and the builder has to give the buyer something in return (called “consideration”, in legal terms). Consideration is, frequently, given in the form of an express warranty that is for a specified duration (typically, one or two years), and/or a purchase price for the home that is lower than the price would be, if there was no waiver of the implied warranty and the builder had to insure that there are no unknown defects.

In Illinois, the implied warranty of habitability has, also, since 1982, been held to benefit and be available to a subsequent purchaser who purchases, soon after construction, a house from an original buyer who did not waive the implied warranty, because the builder is in the same position as they would have been in, had the original resident not sold the home quickly. In 2015, the 1st District Appellate Court attempted to expand the implied warranty of habitability to second purchasers who did not give a knowing waiver, even when the original purchaser had executed a knowing waiver for which the builder provided consideration and the second buyer bought the house “AS IS” from the original buyer. In an opinion filed May 19, 2016, the Illinois Supreme Court reversed this ruling, and held that the implied warranty of habitability does not continue to apply to a second purchaser, if the original purchaser had given a proper waiver. The Court noted that to hold otherwise would alter the contract for which the builder had bargained. This decision restores the basis for builders to prudently enter express warranties, in consideration for a knowing waiver of the implied warranty by the original purchaser, and is a good reason for all builders to review the contracts and practices they use, to ensure they are properly obtaining a knowing waiver of the implied warranty, if they do offer an express warranty and/or to consider offering an express warranty and/or a reduced purchase price, in exchange for a waiver of the implied warranty.

For those who build in Missouri, it should be noted that Missouri recognizes the implied warranty of habitability – but did not join with Illinois in expanding the protection to a second buyer and limits the warranty to benefit only the first purchaser who had directly contracted with the builder. Similar to Illinois, Missouri allows a knowing waiver by the first purchaser; but strict requirements must be followed.

Bottom line: No matter in which state you build, now is a good time to review your contracts and your practices connected to implied warranties. If your contracts do not include a buyer waiver of the implied warranty of habitability, consult your legal professional to discuss adding a waiver to your contract.

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